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No. _____

IN THE

# Supreme Court of the United States

ROBERT RELFORD

*Petitioner,*

v.

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The Sixth Circuit Court of Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner respectfully requests that this Court accept certiorari on the following questions:

1. Can a governmental agency ignore the specific mandates of its Reasonable Cause Testing drug and alcohol policy and force an employee to submit to a drug test outside of the parameters of that drug-testing policy without committing a Fourth Amendment Constitutional violation?
2. Must a governmental employee physically urinate in order to suffer a violation of his Fourth Amendment Constitutional rights?
3. Does a governmental agency violate an employee's Constitutional rights when it disciplines that employee based upon drug test results authorized by an order that is subsequently determined to be invalid?
4. Can a federal court ignore factual findings contained in a final state court administrative agency action?

## PARTIES TO THE PROCEEDINGS

The parties below were petitioner Robert Relford (appellant), and respondent Lexington-Fayette Urban County Government (appellee below).

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SUPREME COURT OF THE UNITED STATES

ROBERT RELFORD

*Petitioner,*

v.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

*Respondent.*

* * * * *

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

ROBERT RELFORD, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

This matter arose as a result of a suspension and attempted termination of Petitioner, a government employee, following the Respondent's failure to comply with its own drug-testing procedures adopted to conform to the protections mandated under the Fourth Amendment. When the Petitioner refused to submit to the illegal test, the Respondent suspended him and ordered him to undergo random drug-testing. The Kentucky state court, reviewing the Respondent's actions as part of an administrative appeal, held that the Respondent's actions were arbitrary and capricious, and that the Respondent had failed to

adhere to its own drug testing standards and procedures that were established to protect the employee's rights under the Fourth Amendment to the United States Constitution.

Petitioner filed an action in the United States District Court for the Eastern District of Kentucky claiming violations of his Constitutional rights under the Fourth, Fifth, and Fourteenth Amendments resulting from the drug-testing actions taken by the LFUCG with regard to both the initial attempt to drug test Petitioner as well as the LFUCG's subsequent mandatory drug-testing of the Petitioner. The District Court ultimately concluded that the Respondent's actions were reasonably justified, stating that "the Court finds that an arrest for possession of drug paraphernalia is also a suitable factor that may be taken into account" [Appx. 22a]. In addition, the court also held that, even though Petitioner was suspended from his employment as a result of his refusal to subject to the illegal drug test, "he was never searched in violation of the Fourth Amendment ... [and thus] was never subjected to a 'search' or 'seizure,' [and] no possible Fourth Amendment violation could have occurred." [Appx. 30a.] Judgment was entered in favor of the LFUCG. [Appx. 26a.]

An appeal was subsequently taken to the United States Court of Appeals for the Sixth Circuit, and the Sixth Circuit affirmed the decision of the District Court [Appx.1a], 2004 U.S.App. LEXIS 24464 ((6th Cir. 2004), ___ F.3d ____ (6th Cir. 2004). That decision of the Sixth Circuit is now in direct conflict with this Honorable Court's decisions mandating minimum safeguards in the drug-testing of public employees, and, if allowed to stand, will allow governmental entities to ignore their published drug-testing policies and procedures and to demand drug-testing of their employees as long as the governmental entity can provide some justification, after the fact, for suspecting the employee of substance-related activity. This will give rise to a nebulous "reasonable suspicion"

standard not found in the entity's published drug-testing policy and procedures.

## STATEMENT OF JURISDICTION

Subject matter jurisdiction for the United States District Court for the Eastern District of Kentucky is found in 28 U.S.C. § 1331. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Amend. IV, V, and XIV; 42 U.S.C. § 1983.

## STATEMENT OF THE CASE

Robert Relford worked for Lexington-Fayette Urban County Government ["LFUCG"] as an electrician. He was arrested on May 29, 1997 for criminal trespass and possession of copper tubing used in his job but which was characterized as drug paraphernalia. A month later, when Relford's supervisor discovered that Relford had been arrested, the supervisor served him with a notification of reasonable cause testing ["RCT"] and a instructed Relford to immediately undergo a drug test. The LFUCG's "Alcohol and Drug Free Workplace Guidelines and Procedure Handbook ["Handbook"] specifically provides that notice of an RCT can issue only when the LFUCG has a "reasonable suspicion" that the employee is under the influence of drugs or alcohol ***at work***, or that his behavior or performance ***at work*** is affected by drugs or alcohol. [Appx. 3a.] The LFUCG admitted that Relford exhibited no such signs.

The Handbook requires that the LFUCG's decision to issue an RCT must be based upon actual observation and documentation of drugs or alcohol, including smelling alcohol

on the employee's breath, hearing slurred speech, observing impaired actions or conduct, and appearance. [Appx. 3a.] In addition, the Handbook required that such a determination had to be in writing, signed by two trained supervisors or professional law enforcement or medical personnel. Only after that RCT determination has been made can the Director of the employee's Division issue the RCT Notice and require the employee to submit to a drug test involving urine, blood, or breath. [Appx. 3-4a.]

Even though no one at the LFUCG had made any such observations nor had any documentation of drug or alcohol abuse by Relford, and even though there was no determination made in writing by two trained supervisors or professionals, all as required under the LFUCG Handbook, the LFUCG issued an RCT notice requiring Relford to undergo a drug test, claiming that the RCT was reasonable because of his "recent police arrest for possession of a controlled substance and drug paraphernalia." Relford, however, had never been arrested for possession of a controlled substance, only for possession of drug paraphernalia. Based on the faulty RCT notice, Relford requested that the notification be corrected to state a proper basis, and when the LFUCG refused to do so, Relford refused to take the drug test. [Appx. 4a.]

The LFUCG then filed a charge with the Civil Service Commission ["CSC"] requesting that Relford be terminated because of his refusal to take the drug test. [Appx. 4a.] On October 15, 1997, the CSC concluded that the LFUCG had reasonable grounds to subject Relford to a drug test, even though the CSC acknowledged that "the Government failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test ... by and through the obviously inaccurate or defective 'Notification of Reasonable Cause Testing'; [and,] [t]hat the Government's guidelines in regard to 'reasonable cause testing' are confusing." [Appx. 4a.] Although

the CSC refused to approve Relford's dismissal, it authorized a 30 day suspension and required him to participate in an employee drug-treatment program that included random drug-testing. [Appx. 4a.] Relford appealed this suspension and mandatory drug-testing. However, on December 1, 1997, while his appeal was still pending, he was ordered to undergo a random test and tested positive. [Appx. 5a.]

Faced with termination and prolonged suspension, Relford was forced to resign. [Appx. 5a.] Six months later, the Kentucky circuit court struck down the CSC's order that had suspended Relford and had subjected him to the random drug-testing. That decision was affirmed by the Kentucky Court of Appeals. The state courts specifically concluded that the LFUCG had acted arbitrarily and had failed to comply with its own drug-testing policies and procedures. [Appx. 5a.]

Relford then brought suit against the LFUCG in Federal Court, claiming that his Constitutional rights had been violated twice: first, when the LFUCG demanded that he submit to an RCT pursuant to a notice that was defective on its face and which did not comply with the RCT requirements contained in the Handbook; and second, when the LFUCG used the results of a subsequent random test that had been permissible only under an order that had been nullified by the state court.

Notwithstanding the state courts' decisions, the District Court ruled in favor of the LFUCG [Appx. 15a; Appx. 27a], finding that the Relford's arrest for "possession of drug paraphernalia" provided the LFUCG with sufficient "reasonable suspicion" to justify the RCT test [Appx. 24a], notwithstanding the lack of any such provisions in the LFUCG's policy. Relford appealed that decision to the Sixth U.S. Circuit Court of Appeals, claiming that the LFUCG violated his constitutional right not to be searched and his right to due process.

The Sixth Circuit concluded that the LFUCG's failure to follow its own Handbook's policies for conducting an RCT did not result in a violation of Relford's Constitutional rights; [Appx. 1a.] that Relford's refusal to take the faulty drug test precluded him from recovery [Appx. 10a]; and finally, that Relford suffered no loss attributable to the second test because the LFUCG had provided Relford with sufficient notice to satisfy his due process rights. [Appx. 11a-12a.] The within Writ follows.

## REASONS FOR GRANTING THE WRIT

### I. CAN A GOVERNMENTAL AGENCY IGNORE THE SPECIFIC MANDATES OF ITS REASONABLE CAUSE TESTING DRUG AND ALCOHOL POLICY (AS SET FORTH IN ITS EMPLOYEE HANDBOOK )AND LEGALLY FORCE AN EMPLOYEE TO SUBMIT TO A DRUG TEST NOT IN CONFORMITY WITH THE AGENCY'S POLICY?

Searches and seizures are typically required to be conducted pursuant to a valid warrant, designed in part to provide a detailed scope of the search. With respect to workplace drug policies that provide for individualized employee testing, constitutionally-based rules requiring documentation of reasonable cause "assure that judicially-mandated and agency-directed constitutional rights are respected." Garrison v. Dept. of Justice, 72 F.3d 1556, 1573 (Fed. Cir. 1995). Further, "[w]here the rights of individuals are affected, ***it is incumbent upon [employers] to follow their own procedures***." Morton v. Ruiz, 415 U.S. 199, 235 (1974). [Emphasis added.]

In Skinner v. Railway Labor Executives' Assoc., 589 U.S. 602, 617 (1989), citing with authority, Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170 (1987), this Court specifically held that requiring public employees to submit to a urine test clearly falls under the guise of a Fourth Amendment

search "[because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable...." [Citations omitted.] 617.[1]

In the case at bar, Relford, unlike the employees in Skinner, *supra,* and Von Raab, *supra*, was ***not*** directly engaged in employment which rises to such a level as constitutes "special needs." Moreover, the LFUCG has never articulated any basis short of the individualized reasonable suspicion required by Vernonia School Dist. 47 v. Acton, 515 U.S. 646 (1995) and its progeny, with respect to Relford. The LFUCG's failure to provide the specificity required by the Fourth Amendment resulted in an unconstitutional testing of Relford.

In its Opinion and Order, the CSC concluded that "the Government failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test; [t]hat the Government may have ... ***misled*** Mr. Relford as to those grounds and the consequences of his failure to take the test, by and through the ***obviously inaccurate or defective*** "Notification of Reasonable Cause Testing"; [and,] [t]hat the Government's guidelines in regard to 'reasonable cause testing' are ***confusing***." [Emphasis added.] Each of these conclusions leads to an unconstitutional drug-testing of Relford.

**A. The lower courts' conclusion that Relford's Fourth Amendment rights were not violated because he did not actually urinate in a cup is in direct conflict with See v. City of Seattle and Camara v. Municipal Court and their progeny.**

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[1] The Skinner Court ultimately allowed testing due to the "surpassing safety interests" inherent in the underlying train accident drug testing policy, emphasizing the importance of testing immediately following train accidents -- an issue not present in the underlying case.

In rejecting Relford's position, the lower courts improperly concluded that the LFUCG's suspension and threatened termination of Relford, as well as the faulty drug-testing Notification, did not result in a Fourth Amendment violation because Relford did not actually urinate in a cup. This ruling is in direct conflict with See v. City of Seattle, 387 U.S. 54, 87 S.Ct. 1737 (1967) and Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967). In each of these cases, this Court addressed the validity of an administrative search despite the fact that the claimant had been punished for refusing to submit to a search. Importantly, ***neither*** individual in Camara or See actually subjected himself to a search. Instead, just as Relford, each of the claimants sought protection from the Courts and/or administrative bodies, and refused to submit to an illegal search. In each case, despite the fact that the individuals had not "actually subjected [themselves] to a [search]," as mistakenly required hereinbelow, this Court clearly established that a Fourth Amendment violation occurs when an individual has ***refused*** to allow an illegal search and/or seizure, and does not require that the individual first subject him or herself to an unconstitutional violation before having standing to sue.

Numerous courts, in addition to Camara and See, *supra*, have held that even when there has been a refusal to submit to a search on the basis of an alleged Fourth Amendment violation, it is appropriate to conduct a Fourth Amendment analysis into the reasonableness of the demand. *See e.g.*, Carrelli v. Ginsburg, 956 F.2d 598 (6th Cir. 1992)(a jockey's refusal to submit to drug test); Ensor v. Rust Engineering Co., 935 F.2d 269 (6th Cir. 1991)(nuclear weapons plant worker's refusal to submit to a drug test); Willis v. Anderson Community School Corp., 158 F.3d 415 (7th Cir. 1998)(student's refusal to provide urine sample); Roberts v. City of Newport News, 36 F.3d 1093 (4th Cir. 1994)(employer's "demand that Roberts submit to urinalysis ***was not made***

***pursuant to a systemized program of any sort*** and [the employer] did not have 'reasonable suspicion' that Roberts was using drugs ***while on the job***")(emphasis added); Hearn v. Board of Public Education, 191 F.3d 1329 (11th Cir. 1999)(teacher terminated from position for refusing to take drug test); Hatley v. Department of Navy, 164 F.3d 602 (Fed. Cir. 1998)(firefighter's refusal to submit to random drug test); King v. McMickens, 501 N.Y.S.2d 679 (1986) (when the refusal to take a drug test results in disciplinary action, the issue is whether the requirement to submit is justified under the Fourth Amendment).

It has been well established that a ***threatened*** violation of one's constitutional rights is sufficient to establish a cognizable right. Elrod v. Burns, 427 U.S. 347, 373-74 (1976); United States v. Allen, 644 F.2d 749 (9th Cir. 1980); United States v. Place, 462 U.S. 696, 707 (1982); Chicago Acorn, et al. v. Metropolitan Pier and Exposition Authority, 941 F.Supp. 692 (N.D.Ill. 1996); Stott v. Revere Transducers, Inc., 993 F.Supp. 118, 125 (D.Conn. 1998). The lower courts' conclusion that no violation of the Fourth Amendment could have occurred because Relford did not "actually subject[] himself to a drug test" is contrary to existing law. Camara, *supra*; See, *supra*.

In O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987), this Court established that public employees who have a legitimate expectation of privacy are protected by the Fourth Amendment to the United States Constitution against unreasonable workplace searches and invasions of their privacy and that the analysis to be utilized is one of the balancing of "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." Ortega, *supra* at 719-20. As articulated in National Treasury Employees Union v. U.S. Department of Treasury, *et al*, 838 F.Supp. 631 (D.C. D.C. 1993)(emphasis added):

> ***[T]he injury is the threatened loss of constitutional rights. That injury occurs when plaintiffs are forced to choose between revealing constitutionally protected information ... and preserving their rights at the cost of possible further discipline or discharge***." ... The Supreme Court has determined that a ***threat*** of discharge for exercising First Amendment rights is sufficient to establish irreparable harm. Elrod v. Burns, 427 U.S. 347, 373-74 (1976).

As this Court has repeatedly held, the government cannot punish constitutionally protected conduct by denying government employment. Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)). By punishing an employee for exercising his Fourth Amendment rights in refusing to submit to a search, the employer has violated the employee's Fourth Amendment rights to be free from unreasonable searches and seizures. Id. Any other conclusion denies governmental employees the very protections that all citizens enjoy, and is directly contrary to the Fourth Amendment.

In the case here under review, Relford was actually placed under the control of his immediate superior, driven to the testing facility, and threatened that any failure to abide by his superior's instructions would result in termination. The lower court's ruling that an employee must submit to an unconstitutional search before a claim could be brought under the Fourth Amendment, precludes the claimant's right to challenge the demand, as recognized, *en banc*, in Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987)("[b]ecause Everett's continued employment was contingent upon his subjection to a search, ***we must determine whether the search offended the Fourth Amendment***. *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)." [Emphasis added.]

The lower courts' refusal to adhere to the precedent

established by Elrod, *supra*, and its progeny, sets the Sixth Circuit apart from the other Circuit Courts to have addressed this issue, and results in unequal enforcement of the United States Constitution among the various Circuits, thereby necessitating the issuance of a Writ of Certiorari to the Sixth Circuit.

**B. Demanding that an employee submit to drug testing in violation of the governmental entity's own drug-testing policies and procedures is an unconstitutional seizure.**

As set forth by the Fourth Circuit Court of Appeals, a seizure is unconstitutional if the "demand that [the employee] submit to urinalysis ***was not made pursuant to a systemized program of any sort*** and [the governmental employer] did not have 'reasonable suspicion' that [the employee] was using drugs ***while on the job***." Roberts v. City of Newport News, 36 F.3d 1093 (4th Cir. 1994)(emphasis added).

The LFUCG policy provides that reasonable cause testing can only occur when the supervisor has documentation of contemporaneous observation of the employee's use or abuse of drugs and/or alcohol, ***on the job***, in a manner that conspicuously impacts the employee's ability to perform his job. Reasonable suspicion alone is not enough. Here, there was no evidence of any such contemporaneous observation or information that would support a suspicion that Relford was "under the influence of drugs or alcohol" or that someone had seen or heard that drugs and/or alcohol were "being used or stored on LFUCG property." Neither was there any documented evidence that would justify the criteria of the LFUCG's Reasonable Cause Testing. The only basis documented at the time of the demand that Relford undergo mandatory drug testing, and the only basis **ever** communicated to Relford at the time of the RCT Notice, was his falsely

purported "recent police arrest for '***possession of a controlled substance*** and drug paraphernalia.'" [Emphasis added].

As reflected *infra*, the state courts definitively established that "the reason given for the testing was an arrest ... [which] is not one of the criteria for ordering a drug test ...; the basis for the decision to test was not properly documented...; [and] reasonable suspicion, as defined in the Handbook, was not satisfied.... For these reasons, requiring [Relford] to submit to the Reasonable Cause Testing did not satisfy reasonable suspicion under the urban county government's own drug policy; therefore, the decision of the [Commission] was arbitrary." Given a total lack of evidence to support the CSC's conclusion that a proper basis for RCT existed at the time the RCT Notice was issued, the state agency action correctly determined that the LFUCG's actions were arbitrary and that Relford's refusal to submit to such a test was entirely proper. The lower courts, however, concluded that it was of no consequence that the LFUCG ignored its own policies and procedures. Such a holding is in direct conflict with Roberts, *supra*, and a Writ of Certiorari should be issued to the Sixth Circuit Court of Appeals to ensure uniformity among the Circuits.

**C. Does a governmental agency violate an employee's Constitutional rights when it disciplines that employee based upon drug test results authorized by an order that is subsequently determined to be invalid?**

Before the state court could vacate the CSC Order, the LFUCG forced Relford to comply with the terms of the subsequently-vacated order that required Relford to undergo mandatory drug-testing. Under the express drug-testing procedures set forth in the Handbook, the CSC lacked authority to compel Relford to participate in the second drug-testing

procedure without first converting Relford's proper refusal to submit to the first drug test into a ***positive*** drug test in order to "justify" the second drug-testing. This effort served as nothing more than an end-run around the Constitutional protections afforded to Relford in order to obtain the very drug-testing that is prohibited by the Constitution by use of a demand that was declared invalid by the state court.

Under Fourth Amendment Constitutional law, ***any*** invasion of privacy by the government is, as a matter of law, a violation of an individual's right to privacy ***unless*** it can demonstrate that it has a legitimate basis for engaging in the invasion. Ortega, *supra*. Skinner, *supra*, also provides guidance, stating that "[w]hat is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' ... Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of ***legitimate*** governmental interests.'" Id. at 619. [Citations omitted; emphasis added.] Once the government has taken an employee into custody to be tested, it is unquestionable that the seizure itself results in a constitutional violation -- ***unless the government is able to demonstrate a reasonable basis for its actions.*** Id. *See also* Arizona v. Evans, 514 U.S. 1 (1995).

Since Relford's initial drug test, based solely upon a faulty RCT notice cannot pass the necessary test for reasonableness as set forth in the LFUCG's own policy (and thus the Fourth Amendment), the LFUCG's actions constituted an improper invasion of Relford's right to privacy and a failure to accord to Relford his Fifth Amendment rights to a fair and proper notification, a proper post-deprivation hearing, and an ability to adequately defend. Accordingly, the lower courts' conclusion that Relford was not able to prove an invasion of his privacy as to the initial drug testing efforts because he was not actually subjected to the drug test, or as to the second drug test because

it was "reasonable," fail to properly apply federal Constitutional law.

The lower courts, after mistakenly concluding that Relford did not undergo a search or seizure, negated Relford's Constitutional challenge by concluding that, despite the state agency's previous rulings, and despite the fact that the LFUCG failed to adhere to its own drug-testing procedures, the LFUCG still had "reasonable cause" to drug test Relford because "an arrest for possession of drug paraphernalia is ... a suitable factor" upon which to find reasonableness. The lower courts further attempted to justify the drug testing by erroneously concluding that Relford had "conceal[ed] the arrest in violation of LFUCG policy." However, the LFUCG Handbook contains no such reporting requirement, and the lower courts' conclusion that such a failure to report "demonstrate[d] an even more critical connection to unlawful activity involving controlled substances" is contrary to the Handbook's express provisions.

Significantly, the lower courts' conclusions totally ignore the determination by the Kentucky Court of Appeals that reasonable suspicion was not satisfied, and that the LFUCG did not have reasonable cause to force Relford to undergo a drug testing procedure. As this Court has repeatedly instructed, all governmental employee drug-testing must be conducted pursuant to a ***well-defined plan*** or ***systemized program***. *See e.g.*, Skinner, *supra;* Von Raab, *supra.* In the case here under review, there is no dispute that the LFUCG failed to follow the mandates of its own policy.[2]

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[2] The lower court attempted to justify the LFUCG's actions by opining that Relford "occupies a position that might otherwise be subject to true suspicionless testing by LFUCG" because he "worked as an electrician operating a city owned vehicle on public roadways." [Appx. 20a.] Importantly, the

(continued...)

Based upon Skinner, *supra*, and Von Raab, *supra*, and their progeny, the decision reached by the Sixth Circuit in the matter here under review establishes a dangerous precedent whereby a governmental entity can easily side-step the careful network or legal precedent that has been established to protect the rights of public employees from intrusive governmental actions by simply establishing a *post hac* excuse for its "reasonable suspicions." This cannot be allowed to occur. Public employees must have the right to refuse to submit to unconstitutional and improper drug testing based upon "suspicions" that do not arise from the activities delineated in the employer's well-defined plan or systemized program.

Accordingly, a Writ of Certiorari must be issued to the Sixth Circuit in order to assure that drug-testing is done in conformity with well-defined plans and systematic programs and to maintain a consistent procedure to be followed in the drug-testing of public employees.

## II. UNDER THE DOCTRINE OF ISSUE PRECLUSION, THE LOWER COURTS ERRED IN FAILING TO ADHERE TO THE FINDINGS OF THE STATE COURT.

In University of Tennessee v. Elliott, 478 U.S. 788, 106 S.Ct. 3220 (1986), this Honorable Court held, "when a state agency 'acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an

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(...continued)
"safety-sensitive" rationale was never set forth as a basis for the drug testing of Relford. In fact, had Relford's position as a lowly electrician truly been "safety-sensitive," the LFUCG could have easily relied upon the drug testing criteria that exists in its policy for individuals in positions that the LFUCG has deemed are safety sensitive in nature.

adequate opportunity to litigate,' federal courts ***must*** give the agency's factfinding the same preclusive effect to which it would be entitled in the State's court." [Emphasis added]. In addition, 28 U.S.C. §1738 requires that federal courts afford state court judgments both the issue and claim preclusive effects in subsequent actions under 42 U.S.C. § 1983 that the state courts would afford them. *See* Elliott, 106 S.Ct. at 3225 (*citing* Allen v. McCurry, 449 U.S. 90 (1980)(issue preclusion) and Migra v. Warren City School District Bd. of Educ., 465 U.S. 75 (1981)(claim preclusion). *See also* Barnes v. McDowell, 848 F.2d 725, *rehearing den., cert. den.* 109 S.Ct. 789 (6th Cir. 1988)("[t]he factual determination of the state administrative proceedings, as sustained by the state courts ... may not be relitigated in federal court").

Based upon these holdings, the factual determinations made by the Kentucky state courts should not have been subject to relitigation in federal court. Elliott, *supra*; Barnes, *supra*. Instead, the conclusions of the Kentucky state courts should have been given preclusive effect in the underlying action. Unfortunately, however, the lower courts chose to completely ignore the factual determinations that had been definitively established by the previous state agency proceedings, including:

1. "[T]he Government failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test";

2. The ***sole*** basis for the initial reasonable cause drug testing was based upon Relford's "recent arrest for 'possession of a controlled substance and drug paraphernalia'";

3, "[T]he Government may have ... misled Mr. Relford as to those grounds [for requiring mandatory drug-testing] and the consequences of his failure to take the test, by and through the obviously inaccurate or defective

'Notification of Reasonable Cause Testing'";

4. "[T]he Government's guidelines in regard to 'reasonable cause testing' are confusing;"

5. The type of drug testing procedure utilized to attempt to force Relford to submit to a search was "reasonable cause testing";

6. "Before undergoing the test ... Relford requested that the reasonable cause notice be reissued to reflect the correct charges";

7. "The Civil Service Commission then issued an order suspending Relford without pay ... ***because he refused to take the drug test***";

8. "[Relford] was selected for testing based on information that he had been arrested for possession of a controlled substance and drug paraphernalia while off duty";

9. "[Relford] was not arrested for possession of a controlled substance";

10. "[T]he [LFUCG] has failed to follow its own drug testing policies";

11. "[Relford] was specifically given notice that he was to be tested under "Reasonable Cause Testing";

12. "[A]n arrest of [Relford] for possession of a controlled substance and paraphernalia ... is not one of the criteria for ordering a drug test under Reasonable Cause Testing... regardless of the fact that [Relford] was not arrested for possession of a controlled substance";

13. "[T]he basis for the decision to test was not properly documented";

14. "There is also no indication of any actual observances of the [Relford] (under the influence) other than his arrest, which has already been disgarded [sic] as a valid basis for the testing";

15. "[R]easonable suspicion ... was not satisfied";

16. "There is no indication in the record that [Relford] was observed under the influence of drugs or alcohol";

17. "There is also no indication that [Relford] was using, had used, or was storing drugs or alcohol 'on LFUCG property'";

18. "[R]equiring [Relford] to submit to Reasonable Cause Testing did not satisfy reasonable suspicion under the urban county government's own drug policy";

19. "Reasonable suspicion" is defined as "whether a reasonable, prudent individual, trained in the symptoms of drug or alcohol abuse would believe, based on observation, that someone was under the influence of drugs or alcohol; or that based on observation that drugs and/or alcohol is being used or stored on LFUCG property";

20. "[T]he 'Notification of Reasonable Cause Testing' was not issued in compliance with the Handbook's procedures";

21. "Failure of the Civil Service Commission to follow its own drug testing procedures rendered the notification and subsequent suspension of Relford arbitrary";

22. The LFUCG's attempted drug-testing of Relford and the its order for mandatory drug-testing were "arbitrary and capricious" and "clearly unreasonable";

23. The CSC's conclusion that the second drug testing of Relford was "reasonable" was categorically rejected.

As reflected hereinabove, the state agency determined that the actions taken by the LFUCG were "arbitrary and capricious," "clearly unreasonable," and that the LFUCG "may have misled Relford." Moreover, the state agency definitively concluded that the LFUCG's drug-testing policy and procedure is "confusing," and that the "failure of the Civil Service Commission to follow its own drug testing procedures rendered the notification and subsequent suspension of Relford arbitrary."

Under the clear and concise holding of Elliott, *supra*, once these factual issues were established by the state agency, the federal courts are precluded from relitigating these same issues. Unfortunately, however, both lower courts completely ignored the holding in Elliott, and, despite the state agency's conclusions that the drug-testing of Relford was "clearly unreasonable" and "arbitrary and capricious," concluded that the first and second drug tests were still "reasonable" because Relford was an electrician operating a governmental vehicle who had been arrested for possession of drug paraphernalia, which "suggests use of those materials for consuming illegal drugs." Such a conclusion directly contradicts this Court's holding in Elliott, *supra*, and Certiorari should be issued so as to assure that conclusions reached by state agencies are provided with proper deference in federal court proceedings.

## CONCLUSION

WHEREFORE, Petitioner ROBERT RELFORD respectfully requests that this Court GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to ensure consistency in the implementation of drug-testing procedures for public employees across the Circuits an to eliminate the implementation of a new "reasonable suspicion" standard.

Respectfully submitted,

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Dated: March 17, 2005

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 04a0409p.06

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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ROBERT RELFORD,
*Plaintiff-Appellant,*

*v.*

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
*Defendant-Appellee.*

No. 03-5600

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 98-00334—Joseph M. Hood, District Judge.
Argued: September 22, 2004
Decided and Filed: November 24, 2004
Before: KEITH, MOORE, and GILMAN, Circuit Judges.

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**COUNSEL**

**ARGUED:** James M. Morris, MORRIS & MORRIS, Lexington, Kentucky, for Appellant. Robert L. Roark, WALTHER, ROARK, GAY & TODD, Lexington, Kentucky, for Appellee. **ON BRIEF:** James M. Morris, MORRIS & MORRIS, Lexington, Kentucky, for Appellant. Robert L. Roark, Beth A. Bowell, WALTHER, ROARK, GAY & TODD, Lexington, Kentucky, for Appellee.

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**OPINION**

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DAMON J. KEITH, Circuit Judge. On August 12, 1998, the Plaintiff-Appellant, Robert Relford, filed a civil complaint in which he charged the Defendant-Appellee, the Lexington-Fayette Urban County Government ("County"), pursuant to 42 U.S.C. § 1983, with having violated his constitutional rights in the administration of its employee drug testing policies and programs. Relford complains that the County subjected him to an unlawful search in violation

of the Fourth Amendment by failing to abide by its written procedures and by requiring him to undergo random drug testing. He also claims the County deprived him of due process in violation of the Fifth and Fourteenth Amendments when, according to him, it constructively discharged him from employment.

Following discovery, the parties filed cross motions for summary judgment. On July 17, 2002, the district court dismissed Relford's due process claims because it determined that he had resigned from his employment voluntarily, had not been constructively discharged, and had received all of the process he was due inasmuch as he was given notice of and an opportunity to respond to the County's petition for his termination. On the same day, the district court granted a period of leave to the parties and called upon them to file additional pleadings addressing whether an arrest for possession of drug paraphernalia constituted reasonable grounds for randomly drug testing a government employee. On March 21, 2003, subsequent to the submission of additional briefing papers by each of the parties, the district court entered a summary judgment as a matter of law in favor of the County after finding that, under the circumstances of this case, the County had reasonable suspicion to support its order requiring Relford to undergo random drug testing.

In this appeal, Relford asserts that the district court erred in awarding summary judgment to the County. For the reasons set forth below, we AFFIRM the judgment of the district court.

## *FACTUAL BACKGROUND*

Relford began work as an electrician with the County in July 1993. He, however, was arrested and imprisoned on May 29, 1997, on charges of criminal trespass and possession of drug paraphernalia. As a result of his incarceration, Relford was unable to report to work on the following day, and he commissioned a friend to help him devise an excuse that would innocently explain his absence from work. Shortly

thereafter, this friend apparently contacted the County and falsely reported that Relford's absence was due to sickness. Unfortunately for Relford, his supervisor subsequently learned of his arrest and his improper use of sick leave. He suspended Relford for a period of five (5) days and issued him a notification of Reasonable Cause Testing ("RCT").

The issuance of a RCT notice is governed by the County's Alcohol and Drug Free Workplace Guidelines and Procedure Handbook, which provides, in pertinent part, as follows: Alcohol and Drug Screening shall be conducted under the following circumstances:

. . .

E. Reasonable Cause Testing (RCT) - Employees will be tested for drugs or alcohol when reasonable suspicion exists to support a belief that the employee is under the influence of drugs or alcohol or that the employee's behavior or work performance has been affected by drugs or alcohol. The basis for the decision shall be documented, in writing, by at least two (2) trained supervisors or by professional law enforcement or medical personnel. A determination will be based upon observation and documentation of:

1. Detection of an alcoholic substance emitting from the employee's breath. This shall include a detection of a "hang-over" odor.
2. Observation(s) of the employee's speech being unusually slurred, or noticeably different without a proper medical reason being given.
3. Observation(s) of the employee's actions or conduct as being noticeably different or impaired and not consistent with normal conduct and without proper explanation.
4. Observation(s) that the employee's appearance, in conjunction with the above, indicates that the employee is impaired.

At the request of the Division Director or the Director of Human Resources, the observed employee may be required to submit to an independent blood/breath/

> urine test to determine if the employee is impaired. The requested testing is to be done within two (2) hours but no later than eight (8) hours after the observation. All results of such testing will be delivered immediately to the Director of Human Resources.

Joint Appendix ("J.A.") at 39. The RCT notice that was issued to Relford directed him to proceed immediately to an urgent treatment center where he would be given a drug and alcohol test. The RCT notice indicated that it was being issued on the basis of his "recent police arrest for 'possession of a controlled substance and drug paraphernalia.'" *Id.* at 45. Inasmuch as his arrest did not include a charge for possession, the RCT notice was technically inaccurate.

Relford refused to submit to the RCT. Claiming that his refusal constituted grounds for dismissal, the County filed charges with the Civil Service Commission ("Commission") requesting that Relford's employment be terminated. On October 15, 1997, the Commission held a hearing, during which it gave the parties an opportunity to present evidence in favor of their respective positions. On the same day, the Commission issued an Order finding that the five-day suspension which had been levied against Relford was justified because his actions constituted an "abuse of sick leave and falsification of a report." *Id.* at 46. The Commission further found that under the County's drug testing policies and guidelines "reasonable grounds existed for requesting Mr. Relford to submit to a drug test." *Id.* The Commission, however, opined that the County (1) "failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test;" (2) "may have . . . misled Mr. Relford as to those grounds and the consequences of his failure to take the test, by and through the obviously inaccurate or defective" notice; and (3) used "guidelines in regard to 'reasonable cause testing' [that] are confusing." *Id.* Thus, the Commission ordered that Relford's discipline "be reduced from dismissal to an additional 30 days suspension," and that he "submit forthwith to the Employee Assistance Program (EAP) for evaluation for drug dependency." *Id.*

Relford returned to work and participated in the EAP. The County's EAP is directed exclusively to the "earliest possible diagnosis and treatment for substance or alcohol abuse." *Id.* at 32. Through the EAP, Relford was subjected to drug dependency counseling and evaluation. More importantly, all EAP participants undergo drug-testing in random order. Contemporaneously with his return to work and participation in the EAP, Relford appealed the Commission's order to the Fayette Circuit Court. On December 1, 1997, while his appeal was pending, Relford was randomly selected for drug testing from among the pool of EAP participants. He submitted to the screening and tested positive for the use of illegal narcotics. On the basis of this test result, the County filed a second petition for Relford's termination with the Commission.

On January 21, 1998, prior to the Commission holding a hearing on the second petition, Relford resigned from his employment with the County, indicating that he had found another job. Nearly six months later (on July 15, 1998), the Fayette Circuit Court reversed the Commission's October 15 order because it determined that the County acted arbitrarily and had not complied with its own drug testing procedures. Relford subsequently filed the present cause of action in the United States District Court for the Eastern District of Kentucky.

## *DISCUSSION*

Relford contends that the district court erred in resolving the parties' cross-motions for summary judgment. In reviewing a grant of summary judgment on cross-motions for summary judgment, we apply the same legal standards as the district court. *Benefits Comm. of Saint-Gobain Corp. v. Key Trust Co. of Ohio, N.A.*, 313 F.3d 919, 925 (6th Cir. 2002). A request for summary judgment should be granted only where the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In evaluating each party's motion, the court must view all facts and inferences in the light most favorable to the

nonmoving party. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). Because we consider only questions of law, our standard of review is de novo. *Benefits Comm. of Saint-Gobain*, 313 F.3d at 925.

Relford contends the district court erroneously granted summary judgment in favor of the County because, according to him, the evidence and applicable law establishes that the County violated (1) his right to be free from unreasonable search and seizure, as protected by the Fourth Amendment of the United States Constitution, and (2) his right to due process of law, as protected by the Fifth and Fourteenth Amendments of the United States Constitution.

I.

With regard to his claim of a Fourth Amendment violation, Relford asserts that the district court failed to adhere to the determinations of the Fayette Circuit Court, improperly held that he had not suffered a constitutional violation because he did not submit to the RCT, and erred in concluding as a matter of law that the County had just cause to demand drug testing of him. The district court held that the mandated drug testing of Relford as an EAP participant was reasonable under the circumstances.

The central question pending before this court is whether the County violated Relford's Fourth Amendment right to be free from unreasonable search and seizure when it mandated his participation in the drug and alcohol abuse EAP and thereby subjected him to random drug testing. The Fourth Amendment provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ....but upon probable cause." U.S. Const. amend. IV. In assessing whether the right against unreasonable searches and seizures has been violated, the court must consider whether the action is "attributable to the government," and amounts to a "search" or "seizure" for Fourth Amendment purposes. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989) ("Before we

consider whether the tests in question are reasonable under the Fourth Amendment, we must inquire whether the tests are attributable to the Government or its agents, and whether they amount to searches or seizures."). If the contested action meets both of these requirements, the court then considers whether the search or seizure is "unreasonable" under the Fourth Amendment. *Id.*

In the present controversy, it is clear that both of the initial requirements have been satisfied. The drug test at issue is attributable to government or government-sanctioned action inasmuch as Relford is employed by county government. In addition, it is well settled that drug tests, which utilize blood-testing, breath-testing or urinalysis, constitute "searches" that come within the ambit of the Fourth Amendment. *Skinner*, 489 U.S. 602, 616-617 (citing *Schmerber v. California*, 384 U.S. 757, 767-768 (1966), (finding a Fourth Amendment search in the use of blood-testing procedures); *California v. Trombetta*, 467 U.S. 479, 481 (1984) (finding a Fourth Amendment search in the use of breathalysers)).

Having determined that the test is attributable to government and constitutes a search for Fourth Amendment purposes, the court must now examine the drug testing of Relford for reasonableness. The Fourth Amendment does not preclude all searches that are attributable to the government, only those that are unreasonable. *Skinner*, 489 U.S. at 619. (citations omitted). Whether the intrusion is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

As a general matter, to satisfy the reasonableness requirement, a search or seizure must be "accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner*, 489 U.S. at 619. Stated differently, "a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997)

(citation omitted). The Supreme Court, however, has recognized "particularized exceptions to the main rule," *id.*, when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," *Skinner*, 489 U.S. at 619. (internal quotations and citations omitted). In evaluating these "particularized exceptions," the constitutionality of a governmental policy or procedure "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.*; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Chandler*, 520 U.S. at 314 (quoting *Skinner*, 489 U.S. at 624). Thus, not all suspicionless testing violates the Fourth Amendment.

Evaluating reasonable suspicion "involves a twofold inquiry: first, one must consider whether the action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (citations omitted). In justifying an intrusion, the government "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). "[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Id.* at 21-22.

Relford argues, without contest, that all EAP participants undergo drug testing in random order. We must therefore determine whether the County had a reasonable suspicion

that Relford was involved in illegal drug-related activities when it ordered him to take part in its substance abuse assistance program. In this case, Relford was arrested for criminal trespass and possession of drug paraphernalia. He then failed to report his arrest to his employer. When it became apparent that his incarceration would result in his absence from work, he elicited the help of a friend, with whom he concocted a false excuse in an unsuccessful effort to cover up his absence. Upon his supervisor learning of the arrest and the actual reason for his absence from work, he issued Relford a notice to submit to RCT. Relford refused.

In directing Relford to participate in the drug and alcohol abuse EAP, the Commission found that he had been arrested for possession of drug paraphernalia, falsely called in sick, abused sick leave, and falsified a report. The nature of Relford's employment misconduct, i.e., his dishonesty to his employer exemplified by his efforts to cover up the reasons for his work absence, when accompanied by his arrest for criminal trespass and possession of drug paraphernalia, reasonably suggests his use of the paraphernalia for the consumption of illegal narcotics. Whether a mere allegation of possession of drug paraphernalia, standing alone, would support reasonable suspicion sufficient to justify employee drug-testing is not before us. In the present controversy, however, the undisputed facts sufficiently establish reasonable suspicion that Relford was probably using controlled substances.[3] As such, the order of the Commission directing Relford to participate in the drug and alcohol abuse EAP does not constitute an unreasonable search for Fourth Amendment purposes.

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[3] Inasmuch as we conclude that the search of Relford was supported by reasonable suspicion, we need not address whether Relford was employed in a safety sensitive position nor whether some other justification necessary for suspicionless drug testing existed. *See Skinner*, 489 U.S. at 619; *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 373 (6th Cir. 1998).

Relford advances several additional arguments in support of his Fourth Amendment claim. He contends that the district court erred by failing to adhere to the determination of the Fayette Circuit Court, which found that the County had ordered the drug testing arbitrarily. A review of the record, however, reveals that the State court did not consider the reasonableness of the drug test on Fourth Amendment grounds. In this regard, the State court declined to rule upon the constitutional issue stating that "[w]hether or not the constitutional concerns are satisfied in this case is not really relevant because the respondent [County] has failed to follow its own drug testing policies." J.A. at 97. Although the County may have arbitrarily strayed from its internal policies, that conduct does not conclusively establish a Fourth Amendment violation. *See Guest v. Leis*, 255 F.3d 325, 334 (6th Cir. 2001) (citing *State v. Klemm*, 536 N.E.2d 14, 16 (Ohio Ct. App. 1987) for the proposition that a violation of state law does not make a search unreasonable in a constitutional sense).

Relford also contends the district court improperly concluded that he had not suffered a constitutional violation because he did not actually submit to the first test. Because Relford refused to submit to the notice of RCT, we agree with the district court that he did not suffer any cognizable injury from that notice. Moreover, even if he had submitted to the RCT, our finding that the Commission's order that he participate in the drug and alcohol abuse EAP was supported by reasonable suspicion is rooted in circumstances that occurred prior to his employer's issuance of the RCT notice. Thus, the same facts constitute a reasonable suspicion that would have been equally applicable to the testing required by the RCT notice.

II.

We now turn to Relford's complaint that the County violated his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. In evaluating a claim for a violation of due process rights, this

court applies a two-step analysis. First, we determine whether the claimant has a property interest that entitles him to due process protection. *Leary v. Daeschner*, 228 F.3d 729, 741-42 (6th Cir. 2000) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)). Under state law, government and civil service employees may have a property right in their continued employment. *See Loudermill*, 470 U.S. at 538. Second, if the claimant has such an interest, this Court must determine "what process is due." *Id.* at 541.

The County concedes that Relford possessed a property interest in his continued employment because Kentucky law provides for dismissal or suspension only upon certain showings. *See* K.R.S. § 67A.280 ("No employee in the classified service of urban-county government, . . . shall be dismissed, suspended, or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination, or violation of law involving moral turpitude."). The district court, however, determined that Relford could not maintain his claim for a due process violation because he voluntarily resigned from his job with the County. In addition, the district court held that Relford received notice of the County's intent to seek his termination but declined to use the administrative appeals process, which would have entitled him to a hearing and an opportunity to be heard. Relford argues that he was constructively discharged.

On January 21, 1998, after he tested positive for the use of unlawful drugs, Relford resigned in a letter, stating, "I Robert Relford having found another job with better [and] less stressful working conditions do resign effective Wendsday [sic], Jan 21[,] 1998." J.A. at 93. Thus, the record supports the conclusion that Relford resigned because he found other employment. In addition, Relford received two notices that the County was seeking his termination; first, after he refused the RCT, and second, after he tested positive as an EAP participant. In the instance of the RCT, Relford received a hearing before the Commission during which he was given an opportunity to present evidence. With regard to the EAP testing, however, Relford resigned before a hearing

date had been established. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Loudermill*, 470 U.S. at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Here, Relford was provided both notice and an opportunity to be heard.

We similarly must reject Relford's claim that the RCT notice did not apprise him in a manner that was sufficient to protect his due process rights because it inaccurately accused him of having been arrested for "possession" of narcotics. Relford contends that, in the absence of the defective RCT notice, the Commission would not have directed his participation in the drug and alcohol abuse EAP. The County concedes the inaccuracy of the notice. This technical deficiency, however, did not so totally mislead Relford as to have resulted in a deprivation of his constitutional rights to due process of law. Surely Relford knew that he had recently been arrested and what charges had been lodged against him. Indeed, the evidence suggests that Relford was fully aware of the intent of the challenged notice. In particular, the Fayette Circuit Court noted in its opinion that "[a]t his attorney's suggestion, Relford requested that the reasonable cause notice be reissued to reflect the correct charges." J.A. at 94. Upon our consideration of all of these circumstances, we conclude that the RCT notice was sufficient to place Relford on notice and to protect his constitutional rights to due process of law.

III

We find that the County did not violate Relford's right to be free from an unreasonable search under the Fourth Amendment or his rights to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. Accordingly, we **AFFIRM** the district court's order of summary judgment in favor of the Defendant.

Case No: 03-5600

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**ORDER**

FILED
Dec 17 2004
Leonard Green, Clerk

ROBERT RELFORD
Plaintiff- Appellant
v.
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
Defendant-Appellee

**BEFORE: KEITH, MOORE, and OILMAN, Circuit Judges.**

Upon consideration of the motion for reconsideration and/or in the alternative, petition for rehearing filed by the appellee Lexington-Fayette Urban County Government,

It is **ORDERED** that the motion and petition, be and they hereby are, **DENIED.**

**ENTERED BY ORDER OF THE COURT**

/S/
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-5600

FILED
Nov 24, 2004
Leonard Green, Clerk

ROBERT RELFORD,
Plaintiff-Appellant,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,
Defendant-Appellee.

Before: KEITH, MOORE, and GILMAN, Circuit Judges

**JUDGMENT**

On Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment in favor of defendant Lexington-Fayette Urban County Government is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**

/S/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON
CIVIL ACTON NO. 98-334-JMH

ROBERT RELFORD, PLAINTIFF,

vs. **MEMORANDUM OPINION AND ORDER**

THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, DEFENDANT.

* * * * * * * * * * * * * * *

This matter is before the Court on cross-motions for summary judgment: Plaintiff's motion for summary judgment [Record No. 95] and Defendant's motion for summary judgment [Record No. 96].[1] Defendant has responded to Plaintiff's motion for summary judgment [Record No. 971], and Plaintiff has not replied. Plaintiff has responded to Defendant's motion for summary judgment [Record No. 107], and Defendant has replied [Record No. 108]. These matters are now ripe for decision.

## FACTUAL BACKGROUND

Plaintiff was employed as an electrician by Defendant Lexington-Fayette Urban County Government ("LFUCG"), operating a truck owned by Defendant on public streets. After his arrest on May 29, 1997 for criminal trespass and possession of drug paraphernalia, he did not report for work

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[1] Plaintiff has also filed a motion for extension of time to file a response to Defendant's motion for summary judgment [Record No. 106]. The Court notes that Plaintiff's response was filed in the record, and Defendant did not file a response to the motion for extension of time but did file a reply to Plaintiff's response to its motion for summary judgment. Accordingly, the Court shall consider Plaintiff's motion for an extension of time moot.

the next day because he was in jail. Relford subsequently provided a false excuse for his absence to Defendant. When his supervisor learned of his arrest and the true reason for his absence, he suspended Plaintiff for five days without pay on June 20, 1997, and issued a "Notification of Reasonable Cause Testing," requiring a drug test of Plaintiff.

Plaintiff did not submit to the "reasonable cause" drug test, and Defendant filed charges with the LFUCG Civil Service Commission ("Civil Service Commission") asking that Plaintiff be dismissed for refusing to take the drug test. At a hearing, the five day suspension was upheld, but the Commission decided to order Plaintiff to enroll in the Employee Assistance Program ("EAP") and comply with the resulting recommendations from the EAP in lieu of terminating his employment with Defendant. In deciding, the Civil Service Commission determined that the LFUCG had reasonable grounds under the LFUCG's Drug Free Work Policy to request the original drug test.

Upon Plaintiff's challenge to the original reasonable cause test requested by Defendant, the Fayette Circuit Court concluded that there were reasonable grounds under the LFUCG's policy for Defendant to have required Relford to submit to that original test. However, in a separate action by Plaintiff against the Civil Service Commission, the Fayette Circuit Court determined that the Civil Service Commission's determination that he should participate in the EAP was arbitrary and capricious as it failed to follow its own drug testing policies. At no time did the Civil Service Commission or the Fayette Circuit Court reach the issue of whether the decision to test Plaintiff on the basis of his arrest was reasonable under the Fourth Amendment's prohibition against unreasonable search and seizure.

In the midst of these legal proceedings. Plaintiff had returned to work and participated in the EAP, wherein he was subject to evaluations, counseling, and random drug testing. On December 1, 1997, Plaintiff was selected at random for drug testing from among the pool of EAP participants.

Plaintiff tested positive for the use of drugs, and LFUCG sought his termination based on the results of that test. Before a hearing could be held, Plaintiff resigned.

In its order of July 17, 2002, this Court directed the parties to concern themselves with the remaining question of whether an arrest for possession of drug paraphernalia constitutes reasonable grounds for subsequent random drug testing. In its motion for summary judgment, Defendant takes the position that random drug testing would have been acceptable in any circumstance considering the Plaintiff's position and safety concerns, but that, in any event, Defendant's arrest for possession of drug paraphernalia made it reasonable to require Plaintiff to submit to the random drug testing at issue.[2] In his motion for summary judgment, Plaintiff argues that LFUCG cannot demonstrate a sufficient nexus between his off-duty conduct and his employment with the LFUCG, yielding an unreasonable search by means of the random drug test.

## APPLICABLE STANDARD OF REVIEW

Under Fed. R. Civ. P. p 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The moving party may discharge its burden by showing "that there is an absence of

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[2] Plaintiff argues that he was requested to submit to the random drug testing not because of prior arrest for possession of drug paraphernalia as the Court concluded but as a direct result of his refusal to submit to the original drug testing efforts. The Court does not believe that such a distinction is meaningful in its consideration of the Fourth Amendment issue. Ultimately, the Civil Service Commission's order for the Defendant to participate in the EAP and to submit to random drug testing rested on the rationale that drug testing was reasonable based on Plaintiff's arrest.

evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317,325 (1986). The nonmoving party "cannot rest on [his or her] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997). In considering a motion for summary judgment the court must construe the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

## DISCUSSION

### 1. FOURTH AMENDMENT PROHIBITS ONLY UNREASONABLE SEARCHES AND SEIZURES; THUS, GOVERNMENT EMPLOYER MAY REASONABLY REQUIRE RANDOM URINALYSIS DRUG TESTING OF EMPLOYEE WHERE IT HAD REASONABLE SUSPICION THAT EMPLOYEE WAS ENGAGED IN UNLAWFUL ACTIVITY INVOLVING CONTROLLED SUBSTANCES

The Fourth Amendment prohibits the government from unreasonably engaging in searches and seizures of a private individual, and a urinalysis drug test required by a government employer for the purpose of detecting illegal drug use is a search subject to the Fourth Amendment.[3]

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[3] The Fourth Amendment to the U.S. Constitution provides that:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const., Amend. IV. With its nearly identical language, "Section 10 of the Kentucky Constitution provides no greater protection [against search and seizure] than does the federal Fourth Amendment." *LaFollette v. Com.*, 915 S.S.2d 747, 748 (Ky., 1996); *Estep v. Commonwealth*, 633

(continued...)

*National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 678-79 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617-18 (1989). However, this prohibition does not extend to those searches which are not unreasonable. *Skinner*, 489 U.S. at 619.

With regard to those searches made in the government employment context, as opposed to the criminal law context, no warrant is required if the intrusion is based on either "special needs" or reasonable suspicion. *Skinner*, 489 U.S. at 619, 623-23; *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1531-32 (10th Cir. 1996), *aff'g* 917 F.Supp. 760 (D.N.M. 1994). Thus, the "special needs" exception allows drug testing of employees in safety-sensitive positions, pursuant to a random or uniform selection process, without probable cause or even reasonable suspicion that an employee might be impaired because there is a critical nexus between their position and the potential for drug use or impairment. *Von Raab*, 489 U.S. at 679; *Skinner,* 489 U.S. at 633-34; *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 373 (6th Cir. 1998). In the absence of a "special needs" random or uniform selection process, drug testing of a government employee does [sic] selection process, drug testing of a government employee does not

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(...continued)
S.W.2d 213 (Ky. 1983). Finding no cases in which the Commonwealth's courts depart from federal search and seizure jurisprudence under the Fourth Amendment on this issue, the Court shall dispense with Plaintiff's claims for violation of his rights to be free from search and seizure under the Kentucky Constitution upon its analysis of the matter under the U.S. Constitution. Inasmuch as we conclude that the search of Relford was supported by reasonable suspicion, we need not address whether Relford was employed in a safety sensitive position nor whether some other justification necessary for suspicionless drug testing existed. *See Skinner*, 489 U.S. at 619; *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 373 (6th Cir. 1998).

require a warrant, but must be based on individualized suspicion, i.e., a reasonable suspicion that the employee was engaging in unlawful activity involving controlled substances. *Saavedra*, 73 F.3d at 1532; *Jackson v. Gates*, 975 F.2d 648, 652-53 (9th Cir. 1992), *cert. denied*, 509 U.S. 905 (1993); *Dowd*, 931 F.2d at 1289; *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

Plaintiff argues that his selection to participate in the EAP and the subsequent and ostensibly random drug test were not, in fact, the type of "special needs" random or uniform selection process contemplated by Defendant LFUCG. The Court agrees. While Plaintiff's selection from among the pool of persons participating in the EAP may have been random, as Defendant contends, he was placed in that pool based upon his arrest for possession of drug paraphernalia and the resulting suspicion of drug use.[4]

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[4] Clearly, the LFUCG has not only an interest but an imperative to see that certain workers perform their jobs safely and, thus, without impairment. *See Skinner*, 489 U.S. at 633-34 (upholding suspicionless or random drug testing without individualized suspicion for railroad employees performing "safety-sensitive tasks"); Von Raab, 49 U.S. at 679 (same for Customs Service employees involved in interdiction of illegal drugs or those required to carry firearm); *Knox County Educ. Ass'n*, 158 F.3d (same for teachers entrusted with safety and welfare of students). Notwithstanding the Court's determination that this was not a true suspicionless testing scenario as Relford was placed in the pool to be tested based on the LFUCG's reasonable suspicion, the Court has noted the nature of his employment and has considered that he occupies a position that might otherwise be subject to true suspicionless testing by LFUCG upon a balancing of Plaintiff's privacy interests and the governmental interest. *See Skinner*, 489 U.S. at 633-34.

Plaintiff worked as an electrician operating a city owned vehicle on public roadways, and the dangers posed by such an employee's substance abuse are all too clear. Faulty electrical

(continued...)

Where a public employer singles out an employee for random drug testing as part of a pool of employees similarly selected for random drug testing for cause, it is the opinion of this Court that the law requires the employer to possess reasonable suspicion to believe the employee was engaging in drug activity.[5] *See Jackson v. Gates*, 975 F.2d at 652-53 (compelled drug testing must either be based on "articulable, individualized" reasons or as a result of a purely random selection process in order to avoid violating Fourth Amendment search and seizure provisions); *Ford v. Dowd*, 931 F.2d 1286, 1292 (8th Cir.1991) ("[I]n the absence of uniform or systematic random selection of employees subject to drug testing, we will allow the Government to enforce drug testing where employees are chosen '*only* on the basis of a reasonable suspicion.'" (emphasis in original) (quotation omitted)); *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74, 77 93d Cir. 1989) (same)); *Saavedra v. City of Albuquerque*, 917 F.Supp. 760, 762 (D.N.M.) 1994). Accordingly, Defendant LFUCG must have had engaged in unlawful activity involving controlled substances in order to conduct the random drug test within the limits prescribed by Fourth Amendment jurisprudence.

**2. CIRCUMSTANCES SURROUNDING THE**

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(...continued)
work could cause fires, ill-handling of wiring could result in electrocution of an employee or bystanders, and inattention or poor judgment at the wheel of a motor vehicle could result in injuries or death to the employee or others on the roadway. Additionally, Plaintiff was not always in a position to be observed by other LFUCG personnel when he was on the job, and the danger that use of illegal drugs could pose to himself and to others was heightened during the time that he was absent from such supervision.

[5] Selection as described above is distinct from selection on a random basis from a pool of employees chosen because of the special nature of sensitivities of their positions with [sic]

**RANDOM DRUG TEST OF PLAINTIFF RAISED REASONABLE SUSPICION THAT HE WAS ENGAGED IN UNLAWFUL ACTIVITY INVOLVING CONTROLLED SUBSTANCES; LFUCG'S RANDOM DRUG TEST OF PLAINTIFF WAS REASONABLE**

Reasonable suspicion will be determined "[u]pon all the circumstances surrounding the search or seizure itself," such that this Court must find that the search was both justified at its inception and "was reasonably related in scope to the circumstances which justified the interference in the first place." *Montoya de Hernandez*, 473 U.S. at 537; *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985); *Terry v. Ohio*, 392 U.S. 1, 20 (1968). In determining reasonable suspicion, "officials 'must point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience.'" *Nocera v. New York City Fire Com'r*, 921 F.Supp. 192, 199 (S.D.N.Y. 1996) (*citing Security and Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 205 (2nd Cir. 1984); *quoting Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982)). However, reasonable suspicion also depends upon the content of information possessed and its degree of reliability. *Id.*

Further, while an employer may not rely upon an "inchoate and unparticularized suspicion or 'hunch,' an employer may draw the kind of "common-sense conclusio[n] about human behavior" upon which "practical-people"–including government officials–are entitled to rely. *T.L.O.*, 469 U.S. at 345-46; *Terry*, 392 U.S. at 27; *United States v. Cortez*, 449 U.S. 411, 418 (1981). Thus, it has been determined that "[w]hile certainly not dispositive, an arrest [for trespassing] in a known drug location is a factor that can be taken into account in determining reasonable suspicion." *Nocera*, 921 F.Supp. at 199-2000. As explained below, this Court finds that an arrest for possession of drug paraphernalia is also a suitable factor that my be taken into account in the instant matter.

The *Nocera* court upheld the constitutionality of a

urinalysis test performed on a probationary firefighter upon a report that the plaintiff had been arrested for trespassing at a "know drug location." *Id.* Contrary to fire department rules, the plaintiff had not reported his arrest and only admitted to it after being confronted with it when the fire department was notified of the arrest by the Division of Criminal Justice some eighteen days after the arrest. *Id.* The district court concluded that plaintiff's failure to report his arrest could reasonably lead his employer to conclude that he was attempting to conceal the fact of his arrest and to forestall follow-up inquiries. *Id.* This was particularly so when considered in light of the probationary totality of the circumstances. *Id.*

Similarly, Plaintiff Relford failed to report his arrest for criminal trespass and possession of drug paraphernalia and provided a false excuse for his absence from work when he was jailed. It is not clear from the pleadings how Plaintiff's supervisor came to be aware of the arrest and false excuse, but the Court shall presume the reliability of those sources as Plaintiff has not disputed that Defendant had reason to know of his arrest. Defendant LFUCG has stated their rationale for subjecting Plaintiff to drug testing as follows:

> ...Plaintiff was arrested for crime related to drugs, lied about the circumstances of that arrest to his supervisors and finally failed to return to work and report same. It is not unreasonable for the employer to find that Plaintiff was likely engaged in substance abuse.

[Response to Pl. Motion for S.J. at 11.]

While *Nocera* did not teach that one could rely upon an arrest for trespassing in a "know drug location" alone, it supports the relevance of arrests for certain actions in determining reasonable suspicion. In the Court's opinion, an arrest for possession of drug paraphernalia and a subsequent attempt to conceal that arrest from one's employer demonstrates an even more critical connection to unlawful

activity involving controlled substances. Unlike the plaintiff in *Nocera*, who was merely in a locale where drugs might have been present, Plaintiff was arrested for possession of drug paraphernalia. Possession of drug paraphernalia reasonably suggests use of those materials for consuming illegal drugs. When considered in combination with Plaintiff's decision to conceal the arrest in violation of LFUCG policy, the undisputed facts are sufficient to establish reasonable suspicion on the part of the LFUCG that their employee might be involved in the use of controlled substances and to require random drug testing of Plaintiff.[6]

## 3. CONCLUSION

It is the opinion of this Court that Plaintiff was lawfully subjected to the random drug test on December 1, 1997, as Defendant LFUCG had reasonable suspicion to believe that he might have been involved in the use of controlled substances. As the necessary reasonable suspicion has been articulated by Defendant LFUCG based on Plaintiff's arrest for criminal trespass and possession of drug paraphernalia to justify the random test of Plaintiff, the test violated neither Plaintiff's Fourth Amendment or Kentucky Constitution §10 rights to be free from unreasonable searches. Plaintiff's remaining claim, premised on the unreasonableness of the

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[6] Plaintiff does, however, contend that the terms of the LFUCG Drug Free Work Policy limit the type of information supporting reasonable suspicion drug testing to that received from direct observation or other direct evidence that the employee's ability to perform his job was impaired because he was under the influence of a drug. The Court concerns itself with the propriety of the drug test under the auspices of the Fourth Amendment. As to whether or not Defendant was in violation of its own contractual provision with its employee, that matter is not before the Court today. *See Malek v. Haun* 26 F3d 1013, 1016 (10th Cir. 1994) (cited in *Benavidez v. City of Albuquerque*, 101 F.3d 620, 624-625 (10th Cir. 1996)) ("[A] violation of a municipal administrative directive does not give rise to a §§ 1983 claim.")

random drug test, shall be dismissed.

Accordingly, **IT IS ORDERED**:

(1) that Plaintiff's motion for an extension of time to file a response to Defendant's motion for summary judgment [Record No. 95] be, and the same is hereby **DENIED AS MOOT**;

(2) that Plaintiff's motion for summary judgment be [Record No. 96], and the same hereby is, **DENIED**;

(3) that Defendant's motion for summary judgment [Record No. 95] be, and the same hereby is, **GRANTED**;

(4) that all remaining claims pending in this matter be, and the same hereby are, **DISMISSED WITH PREJUDICE**.

This the 21st day of March, 2003.

/S/
JOSEPH M. HOOD, JUDGE

Date and Entry of Service:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON
CIVIL ACTON NO. 98-334-JMH

ROBERT RELFORD, PLAINTIFF,

vs. **JUDGMENT**

THE LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, DEFENDANT.

* * * * * * * * * * * * * * *

In accordance with the Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) That this action be, and the same hereby is, DISMISSED AND STRICKEN FROM THE ACTIVE DOCKET.

(2) That all pending motions be, and the same hereby are, DENIED AS MOOT.

(3) That all proceedings be, and the same hereby are, CONTINUED GENERALLY.

(4) That this Order is FINAL AND APPEALABLE and THERE IS NO JUST CAUSE FOR DELAY.

This the 21st day of March, 2003.

/S/
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON
CIVIL ACTON NO. 98-334-JMH

ROBERT RELFORD, PLAINTIFF,

vs. **MEMORANDUM OPINION AND ORDER**

THE LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, DEFENDANT.

* * * * * * * * * * * * * * *

This action is before the Court on cross motions for summary judgment [Records No. 77 and 78]. The parties have filed their respective responses and replies [Records No. 80, 81, 82 and 83], and this matter is now ripe for a decision.

## FACTUAL BACKGROUND

On May 29, 1997, Plaintiff Robert Relford ("Relford"), an employee of Defendant Lexington Fayette Urban County Government ("LFUCG"), was arrested for criminal trespass and possession of drug paraphernalia. As a result of this arrest, Plaintiff's supervisor issued Plaintiff a "Notification of Reasonable Cause Testing" ("Notice"), which ordered him to submit to a drug test due to his recent arrest for "possession of a controlled substance." Since Plaintiff had not been arrested for possession of a controlled substance, Plaintiff, through counsel, requested that the Notice be reformed to reflect the proper basis for the reasonable cause testing. Defendant refused to reform the Notice and insisted that Plaintiff comply with the Notice. On advise of counsel, Plaintiff refused to take the drug test on the grounds that it violated his Fourth Amendment right to be free from unlawful searches and seizures.

As a result of Plaintiff's refusal, Defendant filed a charge with the LFUCG Civil Service Commission ("Civil Service Commission") on July 2, 1997, seeking Plaintiff's

dismissal for failure to take the drug test. Only July 3, 1997, the Civil Service Commission suspended Plaintiff without pay, pending the outcome of the charge. After a hearing, on October 15, 1997, the Civil Service Commission found that under the LFUCG's Drug Testing Policy and Guidelines, reasonable grounds existed for requesting the plaintiff to submit to drug testing, and that his refusal to do so were reasonable grounds for his immediate dismissal. However, the Civil Service Commission further found that LFUCG failed to adequately advise Plaintiff of the reason it was requesting the drug test; that the LFUCG may have mislead the Plaintiff regarding the consequences of this failure to take the test through the inaccurate Notice; and that LFUCG's guidelines regarding reasonable cause testing were confusing. Instead of terminating the plaintiff's employment, the Civil Service Commission ordered that he be suspended for an additional thirty days, and ordered that he submit to the LFUCG's Employee Assistance Program ("EAP") for evaluation and treatment of any drug dependency.

Plaintiff returned to work and was required to participate in the EAP which included random drug testing. On December 1, 1997, Plaintiff was given and EAP random drug test. On January 9, 1998, Plaintiff resigned his employment with the LFUCG through a letter which stated that he had found a job with better and less stressful working conditions.

Pursuant to K.R.S. § 67A, Plaintiff appealed the Civil Service Commission's decision by filing a suit against the Civil Service Commission in Fayette Circuit Court.[1] Judge

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[1] LFUCG claims that Plaintiff appealed only that portion of the Civil Service Commission decision that suspended the plaintiff for thirty days, and did not appeal the portion of the decision requiring the plaintiff to participate in the EAP. However, upon review of the record, this Court is satisfied that the plaintiff appealed the entire Civil Service Commission

(continued...)

Keller reversed the Civil Service Commission's decision on the grounds that LFUCG did not follow its own drug testing policies inasmuch as an arrest for drug paraphernalia was not grounds for Reasonable Cause Testing under the LFUCG Alcohol and Drug Free Workplace Guidelines and Procedure Handbook. Plaintiff then made a motion for attorney's fees and costs, which was denied on the grounds that the court lacked the statutory authority to award attorney's fees following an appeal of the actions taken by the Civil Service Commission in a state administrative proceeding.

The parties filed cross appeals with the Kentucky Court of Appeals. Plaintiff appealed the denial of attorneys' fees and Defendant appealed the reversal of the Civil Service Commission's decision. The Kentucky Court of Appeals affirmed the decision of the Fayette Circuit Court in its entirety.

## APPLICABLE STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis omitted). *See also Celotex Corp. v. Catrett*, 477 U.S. 317,325, (1986); *Hall v. Tollett*, 128 F. 3d 418, 422 (6th Cir. 1997).

## DISCUSSION

In the remaining claims in this 42 U.S.C. §1983 action,

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(...continued)
decision and that Judge Keller vacated the entire decision.

Plaintiff is alleging that Defendant violated his Fourth Amendment right under the U.S. Constitution as well as his rights under the Kentucky Constitution by ordering him to take a Reasonable Cause Test in violation of LFUCG policies; by suspending him for thirty days and ordering him to participate in the EAP program; and by subjecting him to a random drug test under the EAP. Plaintiff alleges that Defendant violated his due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution and the Kentucky Constitution by depriving him of the opportunity to a full and fair hearing on the termination charge, and by his constructive discharge.

**Fourth Amendment**

Plaintiff cannot succeed on his Fourth Amendment claim based upon LFUCG's issuance of a "Notification of Reasonable Cause Testing" and subsequent attempt to have Plaintiff fired for refusing to take the drug test, inasmuch as no illegal search or seizure occurred. Although the threat of dismissal from employment for refusing to take the drug test is enough to establish a sufficient threat of irreparable harm necessary for injunctive relief, Plaintiff is not seeking injunctive relief in this matter. *See Chandler v. Miller*, 520 U.S. 305 (1997); *Elrod v. Burns*, 427 U.S. 347, 273-74 (1976); *National Treasury Employees Union v. U.S. Department of Treasury*, 838 F.Supp. 631 (D.D.C. 1993). What Plaintiff is essentially seeking is monetary damages, attorneys' fees and costs expended during his challenge of the "Notification of Reasonable Cause Drug Testing" and subsequent administrative appeals process. However, as this Court previously noted in its Memorandum and Order dated February 19, 1999, Plaintiff lacks standing to bring a 42 U.S.C. § 1983 action seeking damages based upon the notice because he was never searched in violation of the Fourth Amendment. *See* Record No. 22 at 7.

Plaintiff was actually searched when he submitted to the random drug test under the EAP. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). LFUCG

argues that the plaintiff is precluded from bring a Fourth Amendment claim on this basis because he either waived his claim by failing to exhaust his administrative remedies, or is impermissibly attempting to split his cause of action making his claim barred by the doctrine of claim preclusion. However, neither argument is sufficient to grant LFUCG summary judgment on Plaintiff's claims. Exhaustion of state administrative remedies is not a prerequisite to filing a § 1983 action, *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and as will be discussed in more detail below, Plaintiff's claim is not barred by the doctrine of claim preclusion. *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988).

Supreme Court precedent provides that federal courts must afford state court judgments and state agency fact-finding the same preclusive effect to which it would be entitled to in the state's own courts. *See University of Tennessee v. Elliot*, 478 U.S. 788 (1986); *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75 (1984); *Barnes v. McDowell*, 848 F.2d 725, 730 (6th Cir. 1988). Defendant's argument that Plaintiff's claims are precluded because he did not assert them in his state court suit against the Civil Service Commission appealing its decision fails because Kentucky law would not preclude the plaintiff from bringing this claim in state court. The Kentucky Supreme Court recently examined Kentucky case law regarding the doctrine of claim preclusion, state that:

> The teaching of these causes are that to utilize the defense that the plaintiff has improperly split the cause of action, the actions must both involve the same parties and the relitigation of the same facts and issues. Additionally, the defense cannot be used to cut off the action before it accrues.

*Watts v. K, S & H*, 957 S.W.2d 233, 237 (KY 1997) (citations omitted). The Kentucky Court cautioned that:

> A broad reading of that part of *Egbert* with states that "res judicata" [is] applicable not only to the issues deposed of in the first action, but to every

> point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time," would foreclose all possible or potential claims against any know potential defendant not brought within the first litigation. *Egbert, supra*, at 124. The rule is simply not that broad, nor is it that simple to apply.

Id. at 238 (*quoting Egbert v. Curtis*, 695 S.W.2d 123 Ky App. 1986). Plaintiff's § 1983 claims in this action are brought against LFUCG, while his Fayette Circuit Court suit was filed against the Civil Service Commission pursuant to K.R.S. § 67A.290. Whether the Civil Service Commission's decision violated the plaintiff's Fourth Amendment rights was not deemed relevant and the issue was not decided in the state court action inasmuch as Judge Keller found that the Civil Service Commission's decision was arbitrary and capricious because it failed to follow its own drug testing policies. Furthermore, Plaintiff did not plead a violation of Fourth Amendment rights due to the EAP drug test in that suit, and could not have because he had yet to be subjected to the EAP drug test. Accordingly, inasmuch as "Kentucky courts do not apply the doctrine of claim preclusion in a subsequent suit involving facts already at issue in another action when the causes of action in the two proceedings are not the same," Plaintiff's Fourth Amendment claim based on the EAP test is not barred by the doctrine of claim preclusion. *Barnes*, 848 F.2d. at 730 (6th Cir. 1988).

Thus, the question that remains for this Court involves the impact of the previous state court ruling regarding the impropriety of the decision requiring the plaintiff to participate in the EAP. The fact that it was improper for the LFUCG to subject the plaintiff to the EAP for refusing to take the reasonable cause drug test because the LFUCG failed to follow its own drug testing procedure is not determinative of whether the EAP drug test violated the plaintiff's Fourth Amendment rights. The Civil Service

Commission's order requiring the plaintiff's participation in the EAP was based upon it finding that Plaintiff's arrest for possession of drug paraphernalia constituted reasonable grounds to submit to a drug test. Thus, the issue is whether an arrest for possession of drug paraphernalia constitutes reasonable grounds for random drug test of a government employee.

> The Fourth Amendment safeguards the privacy of individuals against arbitrary and unwarranted governmental intrusions by providing that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated". However, "the Fourth Amendment does not proscribe all searches and seizures , but only those that are unreasonable." Skinner, 489 U.S. at 619, 109 S. Ct. 1402 (cites omitted). The reasonableness of a search "depends upon all of the circumstances surrounding the search or seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) *(citing New Jersey v. T.L.O.*, 469 U.S. 325, 337-342, 105 S.Ct. 733, 740-743, 83 L.Ed.2d 720 (1985)).

*Knox County Education Ass'n v. Knox County Board of Education*, 158 F.3d 361, 371 (6th Cir. 1998). This analysis requires a balancing of the plaintiff's privacy interests against the public interest. *See National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990). The Court is unable to undertake such an analysis upon the record before it, accordingly, cannot grant either party summary judgment on this issue.

**Fifth Amendment**

This Court, however, finds no merit to Plaintiff's claims that Defendant violated his due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution and the Kentucky Constitution by depriving him

of the opportunity to a full and fair hearing on the termination charge, and by his constructive discharge. "In considering the [plaintiff's] claims for violation of [his] due process rights, this court undertakes a two-step analysis. First, we determine whether the [plaintiff has] a property interest that entitles [him] to due process protection...Second, if the [plaintiff has] such an interest, this court must determine what process is due." *Leary v. Daeschner*, 228 F.3d 739, 741 (6th Cir. 2000) (*citing and quoting Cleveland Bd. of Educ. v. Lourdermill*, 470 U.S. 532 (1985) (quotes omitted). Defendant concedes that Plaintiff possessed a property interest in his continued employment inasmuch as the Kentucky statutes provided for dismissal or suspension only upon a specific showing. *See Id.*; K.R.S. 67A.280. Nonetheless, Plaintiff cannot succeed on his due process claim because he was never deprived of his property interest in his continued employment. Plaintiff stated in his resignation letter that he was resigning his employment because he found a better job. [Record No. 77, Ex. E]. Nor is this Court convinced that Plaintiff was constructively discharged. Plaintiff had the option of presenting a defense at a hearing under K.R.S. §67A.280, instead he chose to resign.

Even if this Court were to find some deprivation of a property interest, Plaintiff received all the process that he was due. "The essential requirements of due process...are notice any opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Id.* at 734. (*quoting Loudermill*, 470 U.S. at 546). Plaintiff received notice that LFUCG was seeking the termination of his employment and was given the opportunity to respond at a Civil Service Commission hearing pursuant to K.R.S. 67A.280, *et seq.*, in both the instance of the Reasonable Cause Testing and the EAP testing. Such process was sufficient to protect Plaintiff's property interest in his continued employment.

## CONCLUSION

Accordingly, **IT IS ORDERED**:

(1) That Defendant's motion for summary judgment [Record No. 77] be, and the same hereby is, **GRANTED IN PART and DENIED ON PART**;

(2) That Plaintiff's motion for summary judgment [Record No. 78] be, and the same hereby is, **DENIED**; and

(3) The parties are granted leave to file any additional summary judgment motions on the issue of whether the EAP test violated Plaintiff's Fourth Amendment rights, on or

before September 3, 2002.

This the 17th day of July, 2002.

/S/

JOSEPH M. HOOD, JUDGE

Date of Entry and Service: